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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1098

GEORGE S. YUMICH AND PHILIP STEVEN SHEAR,
BY HIS FATHER AND NEXT FRIEND, DR. SIDNEY SHEAR,
Cross-Respondents.

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Cross-Petitioner.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE BLAKELY PRINTING COMPANY, CHICAGO 56

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The City of Chicago, cross-petitioner, asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in case No. 18397 reversing the judgment of the United States District Court for the Northern District of Illinois and remanding this cause for a new trial. Cross-petitioner asks that its petition be granted if the petition for a writ of certiorari filed by cross-respondents is granted.

CITATIONS TO OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is printed in the Appendix. It is reported as *Yumich* v. *Cotter,* ..... F. 2d ..... (7th Cir., October 13, 1971, No. 18397).

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 13, 1971. Timely petitions for rehearing were denied by the court on November 29, 1971.

The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

May the Court of Appeals set aside a jury verdict merely because the evidence properly admitted to defeat plaintiffs' claim for wrongful eviction might have influenced the verdict on plaintiffs' claim for assault?

STATUTE AND RULE INVOLVED.

Title 28, United States Code, § 2111.

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not effect the substantial rights of the parties.

Federal Rules of Civil Procedure, Rule 61.

Rule 61. Harmless Error. No error in either the admission of the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new

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trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

STATEMENT OF THE CASE.

Plaintiffs brought this action in the U. S. District Court for the Northern District of Illinois. Federal jurisdiction was based on a federal cause of action, under the civil rights law, and on a tort action under diversity of citizenship. The two plaintiffs sued the City of Chicago, fifteen Chicago police officers, Hilton Hotels Corporation and two Hilton employees. Plaintiffs, in their multi-count complaint, charged that they had been wrongfully evicted from the fifteenth floor of the Conrad Hilton Hotel in Chicago, unlawfully assaulted, and deprived of their civil rights by the defendants.

Before trial plaintiffs' civil rights claim, based on 42 U. S. C. § 1983, against the City of Chicago was dismissed on the City's motion. At the close of plaintiffs' case in chief, the trial court dismissed all of the individual defendants and dismissed the civil rights claim against the Hilton Hotels Corporation. Plaintiffs' state-law claims against the two remaining defendants, the City of Chicago and Hilton Hotels Corporation, for wrongful eviction and unlawful assault were submitted to the jury. The jury found in favor of both the City of Chicago and Hilton Hotels Corporation and against both plaintiffs. (Count III of plaintiffs' Amended Complaint charged both defendants with wrongful eviction and assault. Count V of the Amended Complaint charged Hilton Hotels Corporation with violation of its statutory duties as an innkeeper.)

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Plaintiffs appealed from the judgment in favor of the City of Chicago. On appeal plaintiffs contended that it was error for the court to dismiss their 42 U. S. C. § 1983 claim against the City of Chicago and that the trial court had committed reversible error during the trial. The Court of Appeals for the Seventh Circuit upheld the dismissal of the City of Chicago from plaintiffs' civil rights claim, but reversed and remanded for a new trial. The Court of Appeals held that the trial court did not properly exercise its discretion in failing to limit the amount of evidence justifying plaintiffs' eviction from the fifteenth floor of the hotel. The Court of Appeals held that, since this evidence tended to weaken plaintiffs' claim for assault against the City, it should have been severely restricted.

Summary of Plaintiffs' Case in Chief.

Plaintiffs presented the testimony of twelve witnesses, including the two plaintiffs. The witnesses testified that plaintiffs were members of the McCarthy for President campaign staff. In August, 1968, in preparation for the Democratic National Convention in Chicago, the McCarthy campaign staff had rented rooms in the Conrad Hilton Hotel for use of the McCarthy campaign workers. These rooms were to be used both as office space and to provide sleeping accommodations for persons connected with the McCarthy campaign. Plaintiffs' evidence tended to show that the Hilton Hotel management had agreed that not all occupants of the rooms assigned to the McCarthy campaign staff would be required to register formally with the hotel.

After the Democratic Convention had adjourned, some members of the McCarthy campaign staff held a farewell party in Room 1506A on the fifteenth floor of the hotel. According to plaintiffs' witnesses, it was a quiet party in

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the nature of an open house with people arriving and leaving throughout the early morning hours of August 30, 1968. Liquor was available, but no one drank excessively. Some members of the campaign staff were in the corridors leading to Room 1506A. They were talking, playing cards or listening to guitar music.

McCarthy's campaign manager testified that when he went to bed that night, he had not heard any reports from the police or the National Guard "about debris being tossed out of any windows on the fifteenth floor." (T. 53) None of the plaintiffs' witnesses saw any evidence of objects being thrown from the fifteenth floor windows. They testified that the party had been quiet and orderly throughout the early morning hours.

Suddenly, about 5:00 A. M., more than a dozen Chicago policemen and several National Guardsmen appeared on the fifteenth floor and ordered all the occupants of the floor to leave the hotel. Plaintiffs' witnesses testified that the police ordered everyone in Room 1506A and adjoining rooms and all those in the corridors leading to the elevator lobby to take the elevators directly to the first floor. The police would not allow them to go to other floors in the hotel where other rooms had been assigned to the McCarthy campaign staff.

Plaintiff Yumich testified that when he reached the elevator lobby, he was struck on the chest, grabbed from behind by two policemen, and hit on the head with a club. Plaintiff Shear testified that he was lifted to his feet from the floor where he had been sleeping in Room 1502 and shoved down the hall towards the elevators. As he approached the elevators, he was struck without warning or provocation with a club on his back. Plaintiffs' witnesses testified that neither Yumich nor Shear resisted the police officers in their efforts to clear the fifteenth floor. Plain-

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tiffs' testimony showed that Yumich was treated for a one and a half to two inch scalp laceration and that Shear received first aid for a welt over the back of his neck and shoulder.

Plaintiffs showed that no one had been arrested in connection with the fifteenth floor eviction and that no one had been charged with a crime or violation of the law. (T. 373-376)

Motions and Rulings at the Close of Plaintiffs' Evidence.

All of the individual defendants were dismissed from the action at the close of the plaintiffs' evidence. With the agreement of plaintiffs' counsel, the Hilton Hotels Corporation was dismissed as the remaining defendant on plaintiffs' claim under 42 U. S. C. § 1983. The two remaining defendants were the City of Chicago and Hilton Hotels Corporation. Plaintiffs' claims against the City of Chicago were for wrongful eviction and assault. The Hilton Hotels Corporation was charged with wrongful eviction, assault, and breach of the duties of an innkeeper.

Plaintiff then presented a motion asking the court to exclude all defense evidence "tending to show that any objects were thrown from the windows of the Conrad Hilton Hotel. . . ." In their motion plaintiffs stated that there was no evidence to show that either of the plaintiffs threw any objects from the fifteenth floor onto Michigan Avenue and that they did not "contend that the entry into, or clearing of, Room 1506A was unlawful." However, plaintiffs refused to concede that defendants were justified in requiring the plaintiffs to leave the fifteenth floor of the hotel. The court denied plaintiffs' motion.

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Evidence Presented by the Hilton Hotels Corporation and the City of Chicago.

The evidence presented by the defendants showed that units of the Illinois National Guard were stationed on the Michigan Avenue sidewalk in front of the Conrad Hilton Hotel in the early morning hours of August 30, 1968. Sometime after 3:00 A. M., the National Guardsmen stationed along Michigan Avenue noticed beer cans, ashtrays, and other items dropping to the sidewalk in front of the main entrance of the hotel. National Guardsmen stationed across Michigan Avenue from the hotel pinpointed the source of the falling objects. The Guardsmen observed unidentified persons in Room 1506A reaching their arms out of the windows of the room and dropping various objects to the sidewalk.

The commanding officers of the National Guard units stationed in front of the Conrad Hilton Hotel asked Commander Hayes of the Chicago Police Department to investigate the situation on the fifteenth floor of the hotel. After a conference between hotel personnel and supervisory police officers at 5:30 A. M., four or five policemen and two hotel employees were sent to the fifteenth floor. They found at least twenty-five people in the corridor leading from the elevators to Room 1506A and about twenty people in 1506A. Acting on instructions from the night manager of the hotel, the hotel employees told the occupants of the room that they had to leave. The occupants of 1506A and the people in the corridor were told that they would have to return to the rooms to which they were registered or descend in the elevators to the first floor lobby if they were not registered to a room.

When the 1506A occupants and those who had been in the corridor reached the fifteenth floor elevator lobby, another group of policemen and four National Guardsmen

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were present on the floor. Three of the fifteenth floor occupants began to direct the others to take the elevators up to the twenty-third floor instead of the first floor lobby. (T. 567) At the same time, a member of the group picked up a small table and struck a police officer with it. When the table wielder raised the table to assault the officer a second time, the officer struck him with his night stick, causing the assailant to drop the table. (T. 529, 612, 649) The evidence showed that plaintiff Yumich was trying to force his way into an elevator at the opposite end of the elevator area. When he attempted to strike the police officer who was blocking access to the elevator, Yumich was struck on the back of the head. (T. 155, 740-749) The evidence showed that from sixty to seventy people were crowded into the elevator area at the time of these occurrences. Shear admitted that the bruise he received on the back of the shoulder might have been caused by someone's elbow. (T. 230) All three incidents involving the table, plaintiff Yumich's attempt to strike the police officer, and plaintiff Shear occurred virtually simultaneously and lasted but a few seconds.

Eventually, the 1506A occupants and those who had been in the corridor descended to the first floor lobby. Room 1506A was then locked and secured and nothing further was thrown that night onto the Michigan Avenue sidewalk.

REASONS FOR GRANTING THE WRIT.

If a writ is issued to review the portion of the judgment of the U. S. Court of Appeals for the Seventh Circuit in case No. 18397 which is adverse to the cross-respondents, cross-petitioner asks that the court issue a writ to review the portion of the judgment reversing the judgment of the U. S. District Court for the Northern District of Illinois and remanding this cause for a new trial. Cross-petitioner believes that the decision of the Court of Appeals in this

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case represents such an unjustified departure from the traditional procedures which govern litigation and appellate review in the federal courts that this court should exercise its supervisory power over the Court of Appeals.

A writ should issue to correct the decision of the Court of Appeals for the following reasons:

1. The Court of Appeals has, in effect, reversed and remanded a judgment entered after a properly conducted jury trial merely because the evidence presented to refute plaintiffs' claim for wrongful eviction against both the City of Chicago and Hilton Hotels Corporation tended to weaken their claim for assault against the City.

2. The Court of Appeals held that it was error to allow defendants, in an action which includes a claim for wrongful eviction, to present corroborative testimony supporting defendants' right to evict the plaintiffs even though plaintiffs introduced contradictory evidence, strenuously contested the lawfulness of the eviction, and permitted the evidence to be received without relevant objection.

3. The decision of the Court of Appeals violates cross-petitioner's right to due process in the reviewing court. The Court of Appeals based the reversal upon the admission of evidence which had been consciously programmed into the trial by plaintiffs adamant, unreasonable, and bad faith refusal to concede that defendants had the right to require plaintiffs to leave the fifteenth floor of the Conrad Hilton Hotel. Plaintiffs, at trial, solicited the introduction of the very evidence they now claim was inadmissible.

The Court of Appeals has reversed the judgment of the District Court on an analysis of the case which does not reflect the theories of liability on which this case was tried. The majority opinion of the Court of Appeals arbitrarily asserts that the "real, central issue at trial was whether

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the force used on Yumich and allegedly on Shear was excessive. . . ." (Opinion, p. 11) Due to the effectiveness of plaintiffs' efforts to misrepresent the situation as it existed at trial, the Court of Appeals was ignorant of the fact that plaintiffs introduced evidence in support of the proposition that the presence of the police and the National Guardsmen on the fifteenth floor of the hotel was an unjustified "police raid." Plaintiffs' case was premised on the theory that the behavior of the Chicago Police was motivated by an antagonism towards those supporting McCarthy's candidacy and that the eviction of the fifteenth floor occupants was done for reasons other than the safety of pedestrians on Michigan Avenue. (T. 875)

In their Amended Complaint, plaintiffs charged:

> "During the early morning hours of Friday, August 30, 1968, plaintiffs were, and had a legal right to be, on the fifteenth floor of the Hilton. At all such times, they were acting in a lawful manner and with due care for their own safety and the safety of others.
>
> "At about 5:00 A. M. on Friday, August 30, 1968, the police officer defendants and the hotel agent defendants entered the fifteenth floor of the Hilton and proceeded to evict plaintiffs and the other occupants from the rooms and adjacent areas occupied by the McCarthy for President committee. (This action by defendants is called "the raid" in this complaint.)
>
> "Prior to and at the time of the wrongful acts alleged above, all of the defendants knew or should have known that said wrongs were about to be committed, and, notwithstanding the fact they had the power to prevent or to aid in preventing the commission of said wrongs, neglected or refused so to do." (Amended Complaint, Count III, Paragraphs 19, 20, 27.)

In order to support the claims alleged in their complaint, plaintiffs honed their evidence into a two-pronged attack: (1) defendants wrongfully interfered with plaintiffs' peace-

ful presence on the fifteenth floor of the hotel and (2) defedants used brutal and unreasonable violence in effecting the eviction of the plaintiffs. (Plfts.' Instruction No. 43)

In order to defend against plaintiffs' charges, the defendants introduced evidence justifying their action in requiring the evacuation of the fifteenth floor of the hotel. The defendants had to prove that the eviction of the plaintiffs was reasonable under the existing circumstances and that the hotel had a right to call in the police to effect the eviction. None of the plaintiffs' witnesses had admitted that objects had been thrown from the fifteenth floor windows. Of the many National Guardsmen, Chicago police officers, and hotel employees who witnessed objects being thrown from the fifteenth floor and striking the Michigan Avenue sidewalk, the defendants offered the testimony of eight witnesses. Of these witnesses, only two were called by cross-petitioner, City of Chicago. One of the City's witnesses, John Warren, had been a co-plaintiff in this action until the first day of trial. Former plaintiff Warren admitted that he had been in Room 1506A and had seen one or more beer cans deliberately dropped to the Michigan Avenue sidewalk.

The Court of Appeals seemed to think it was somehow unfair to plaintiffs for the defendants to so effectively rebut their claim for wrongful eviction. At the close of the plaintiffs' case in chief, plaintiffs specifically refused to concede that the forced evacuation of plaintiffs from the fifteenth floor was justified and proper. If plaintiffs had conceded this issue at trial, there would have been no necessity for a full evidentiary exposition of the emergency situation which existed at the Conrad Hilton Hotel prior to the eviction.

Plaintiffs attacked with both arms wildly flailing. The City of Chicago was not required to keep one hand restrained behind its back. Plaintiffs, by maintain-

ing a frivolous claim, assumed the risk that disproof of this claim for wrongful eviction would adversely affect their claim for assault. Defendants were not required to keep the strength of their rebuttal of plaintiff's charges proportionate to the merits of the accusations.

Defendants had the right, duty, and obligation to introduce evidence corroborative of their defense to plaintiff's claim for wrongful eviction. The defendants called eight witnesses to testify to the events which justified the defendants' action in requiring the evacuation of the fifteenth floor. There were numerous other witnesses the defendants could have called.

There were many people who had knowledge of the fact that beer cans, ashtrays, and other objects were being thrown from the fifteenth floor onto the Michigan Avenue sidewalk. The defendants could have called as witnesses the hotel employees, the National Guardsmen, the Chicago police officers, and those who were present in Room 1506A during the early morning hours of August 30, 1968. Of these many potential witnesses to the fact that fifteenth floor projectiles were endangering the safety of the Michigan Avenue sidewalk, the defendants introduced the testimony of eight witnesses.

At trial, plaintiffs consistently refused to concede that defendants were justified in requiring the evacuation of the fifteenth floor. When the defendants presented testimony justifying their actions, plaintiffs permitted the evidence to be received without relevant objection. Plaintiffs' trial counsel realized that the events justifying the eviction were both material and relevant to the plaintiffs' claim for wrongful eviction. Plaintiffs' counsel on appeal deliberately distorted the situation as it existed at trial and dishonestly convinced the Court of Appeals that the only issue involved in the case was plaintiffs' claim for assault.

The Court of Appeals has deprived the City of Chicago of appellate due process. The Court of Appeals has ordered the City of Chicago to submit to a new trial because of the admission of evidence consciously programmed into the trial by plaintiffs' trial tactics. Plaintiffs, at trial, deliberately solicited the introduction of the very evidence they now claim was inadmissible.

Cross-petitioner submits that the Court of Appeals is not authorized to set aside a jury verdict merely because the evidence properly presented to defeat plaintiffs' claim for wrongful eviction tended to weaken plaintiffs' claim for assault. Nor is the Court of Appeals authorized to grant a new trial when the error complained of was not objected to at trial. *Palmer* v. *Hoffman*, 318 U. S. 109, 119 (1943). Even if there were error, 28 U. S. C. § 2111 requires the Court of Appeals to render judgment on appeal without regard to non-substantial errors. And the Federal Rules of Civil Procedure specify that error in the admission of evidence is not in itself grounds for disturbing the judgment. 61 Fed. R. Civ. Proc. Cross-petitioner submits that the decision of the Court of Appeals is inconsistent with substantial justice and violative of the statutory requirement. See *Mercer* v. *Theriot*, 377 U. S. 152, 154 (1964); *United States* v. *Borden Co.*, 347 U. S. 514, 516 (1954); *United States* v. *Craft*, 407 F. 2d 1065, 1070 (6th Cir. 1969); *Hawkins* v. *Missouri Pac. R. Co.*, 188 F. 2d 348, 351-352 (8th Cir. 1951); *Arizona Power Corp.* v. *Smith*, 119 F. 2d 888, 891 (9th Cir. 1941); *Fort Worth & Denver Ry. Co.* v. *Janski*, 223 F. 2d 704, 708 (5th Cir. 1955).

CONCLUSION.

For these reasons, cross-petitioner asks that a writ of certiorari issue to review the judgment of the Seventh Circuit Court of Appeals if the court grants the petition for certiorari filed by cross-respondents.

Respectfully submitted,

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February 25, 1972.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term, 1970 — January Session, 1971

No. 18397

GEORGE S. YUMICH and PHILIP STEVEN SHEAR, by his father and next friend, Dr. Sidney Shear,
Plaintiffs-Appellants,

vs.

JOHN E. COTTER, JAMES GILBRIDE, HOWARD ROTHGERY, ROBERT RICHARD, TIMOTHY NOLAN, SAL ERACI, HOWARD ROSENTHAL, PHILIP SMITH, WILLIAM WRIGHT, EDMUND KAUTZ, JOSEPH CANIK, STANLEY COOK, EDWIN DESMOND, and CITY OF CHICAGO, a Municipal Corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Northern Division.

HON. BERNARD M. DECKER, *Judge*

No. 69 C 966

OCTOBER 13, 1971

Before SWYGERT, *Chief Judge*, FAIRCHILD and PELL, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* This action concerns events which occurred on the fifteenth floor of the Conrad Hilton Hotel in Chicago just after the close of the 1968 Demo-

cratic National Convention. Senator Eugene McCarthy, of Minnesota, had sought the nomination for President, and the fifteenth floor was one of two assigned to his campaign committee. The convention closed Thursday evening, August 29. A number of campaign workers remained in the McCarthy headquarters area on the fifteenth floor into the early morning hours of August 30. About 5 a.m., apparently at the request of hotel employees, fifteen or more city police officers cleared the fifteenth floor and required the occupants to take elevators down to the main lobby. The two plaintiffs, George Yumich and Philip Shear, claim that police officers struck and injured them wilfully and without cause during the eviction.

Yumich is a college textbook editor for a publishing company in New York. In the summer of 1968, he was at first a volunteer worker for McCarthy and later a compensated advance press aide. Shear, who brought suit by his father, was a high school student in California, aged 16, and a volunteer worker, beginning in January, 1968. During the convention he had the assignment of checking the credentials of persons coming to the 15th floor.

The defendants were fifteen Chicago police officers, two hotel employees, the city of Chicago, and Hilton Hotels Corporation.

Count I of the complaint was a civil rights claim, based on 42 U. S. C. § 1983, and directed at all defendants. Count III was a claim under Illinois law against all defendants, in substance for assault. Count V was directed at the hotel and its employees and was a state law claim that they violated duties as innkeepers to guests and licensees. Jurisdiction as to Counts III and V was based on diversity. Other counts were withdrawn.

The district court dismissed Count I against the city because it is a municipal corporation. Plaintiffs argue that this was error.

At the end of plaintiffs' case in chief, no individual defendant had been identified as an assailant. The district court dismissed all counts against individual defendants and dismissed Count I entirely. The jury returned a verdict on Counts III and V in favor of both defendants. Plaintiffs have appealed, but seek reversal as to the city alone.

The first question argued by plaintiffs is whether the district court properly dismissed the civil rights claim for damages against the city. It is not clear, under the circumstances, how a reversal of this ruling would improve their position. If the allegation of unlawful acts of the police officers could give rise to a § 1983 claim against the city, the verdict on the state law tort claim issues established that in fact the police officers' acts were not unlawful. If the verdict be reversed for error, we see no reason why the existence of a civil rights claim against the city would give plaintiffs any advantage at a new trial. Moreover, in the state law tort claims, plaintiffs have the advantage of being able to rely on *respondeat superior*.

In any event, in *Monroe* v. *Pape* (1961), 365 U. S. 167, 192, the Supreme Court held that a similar type of complaint against the city was properly dismissed, saying that Congress did not intend the word "person" subjected to liability by 42 U. S. C. § 1983 to include a municipality. Whatever may be the rationale for joining municipalities in § 1983 suits for injunction or declaratory judgment, usually along with individual officers and board members,[1] we consider that *Monroe* conclusively estab-

1. See *Monroe*, p. 191, footnote 50; *Tinker* v. *Des Moines School District* (1969), 393 U. S. 503; *Lee* v. *Board of Regents*,

lished that a city was not made liable for damages by § 1983.

Plaintiffs point out that under present Illinois law a "city is not immune from liability arising from tortious acts of police officers in the scope of their employment,"[2] and that in civil rights cases 42 U. S. C. § 1988 requires federal courts to apply state law in the trial and disposition of the case if federal laws are not adapted to the object or do not furnish suitable remedies.

Plaintiffs have called to our attention the recent decision of *Carter* v. *Carlson*, ... F. 2d ..... (D. C. Cir., July 23, 1971, No. 23,225) slip opinion, p. 18, holding, as one of several reasons why the District of Columbia might be liable under § 1983, that *Monroe* "held only that § 1983 does not authorize a suit for damages against a municipality which has been clothed in immunity by its parent state." With all respect, however, we read *Monroe* as a binding statutory construction, not dependent upon state law immunity, and not related to a deficiency in federal remedies, but establishing that § 1983 does not impose liability for damages upon a city.[2a]

Plaintiffs seek a new trial of Count III, the tort claim, against the city on account of the admission of a particular line of testimony and the court's refusal to give a requested missing witness instruction. Consideration of these arguments requires a review of the facts.

There were conflicts in testimony on some points. Mindful that the evidence is to be viewed in the light most

..... F. 2d ..... (7th Cir. May 4, 1971, No. 18404); *Schnell* v. *City of Chicago* (7th Cir. 1969), 407 F. 2d 1084, 1086; *Adams* v. *City of Park Ridge* (7th Cir. 1961), 293 F. 2d 585.

2. *Andrews* v. *City of Chicago* (1967), 37 Ill. 2d 309, 226 N. E. 2d 597, 598.

2a. *Ries* v. *Lynskey*, ... F. 2d ..... (7th Cir., September 3, 1971, No. 18512).

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favorable to supporting the verdict, and thus in this case to the defendants, we summarize the facts as follows:

The alleged assaults occurred in the elevator lobby at the center of the 15th floor of the hotel. Background events occurred in Room 1506A and the corridors connecting that room with the elevator lobby. There is testimony concerning eviction of occupants of two other rooms.

Room 1506A and connecting Room 1505A have three windows facing east onto Michigan Avenue. The rooms are at the end of an east-west corridor about 50-60 feet long. A north-south corridor intersects the east-west corridor at its west end. The north-south corridor leads into the east end of the elevator lobby about 20 feet south of the intersection. The dimensions of the elevator lobby are about 45 feet east to west and 25 feet north to south.

A party where a considerable quantity of beer and liquor was consumed took place in 1506A. It was in progress at 1:30 a.m. and continued until terminated by the hotel management and police about 5 a.m. People threw beer cans, ash trays, and other objects out of the window from time to time. These objects fell to the sidewalk just north of the hotel entrance. Members of the Illinois National Guard were stationed along the east side of the hotel because of conditions in Chicago at that time. Officers were concerned about danger from the falling articles and, with the help of two hotel employees, identified Room 1506A as the source.

About 5 a.m., after a conference between hotel employees and police officers, defendant Anderson, a hotel employee, and defendant Gilbride, a police lieutenant, went to the 15th floor, accompanied by two plain clothes policemen, one or two uniformed policemen, and another hotel employee. They went to Room 1506A and talked with the people there. At the time there were a number

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of people, 25 or more, in the elevator lobby and corridors, and about 20 in 1506A. The door to 1506A was open and there was evidence that people came and went and that there was drinking and other social activity among people in the corridors.

After a message was sent down to defendant Matthews, night manager of the hotel, instructions came back to send any registered guests to their rooms and all others to the main lobby. Other groups of police officers and four National Guardsmen came up. Fifteen to 20 police officers were on the 15th floor.

Anderson told the people in 1506A they must leave. Although at first several argued and refused, there was no physical resistance and all left to go to the elevator lobby. The police told all the people to take elevators down to the main lobby. Some went quietly and some argued that they should be allowed to go to the 23rd floor where Senator McCarthy and other campaign workers were. Three exhorted others to go up and not down. There was testimony that some unidentified individuals resisted efforts of the police to get them on elevators. None of this testimony related to any physical resistance offered by plaintiff Shear, and, with one possible exception, none related to physical resistance by plaintiff Yumich. Defense witnesses indicated generally that the police were patient and used only minimal force when force was used.

There was considerable testimony about an attempt by John Warren, one of the campaign workers, to strike police officer Eraci with a table. Eraci defended himself and temporarily disabled Warren by a blow on the head with a baton. John Warren had originally been a plaintiff in this action, but had withdrawn before trial. The Warren incident occurred in the northeast portion of the elevator lobby. Detective Nolan, in plain clothes, had been standing near the southeast corner of the elevator lobby. He went

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toward Eraci, to aid him, but was sprayed in the face with an eye irritant. After first aid, he left the scene. No witness claimed to have observed the person who sprayed Nolan. One or more officers sprayed one or more of the campaign workers with mace.

The alleged assault on plaintiff Yumich occurred a split second before the Warren incident, and Nolan was the only defense witness who gave any testimony which could have been related to the Yumich incident.

Yumich had been in 1506A while Gilbride was there. He testified that after he went to the elevator lobby, he asked a police officer to allow him to go to the 23rd floor; that after permission was denied, the officer struck him in the chest with a nightstick, propelling him backwards; that two officers grabbed him, one on each side, and someone behind him struck him on the head and shoulders. His testimony was corroborated by campaign workers Axelrod, Holmberg, Yarrow, Richard Warren, and, in part, Cohen. The fact that he had a 1½ to 2 inch scalp laceration was established by the deposition of the doctor who gave first aid, and the emergency room record of the hospital where five sutures were inserted about 8 a.m. August 30.

Detective Nolan testified that just before the Warren incident he saw a man near the southwest corner of the elevator lobby start to swing his fist at a uniformed police officer. The officer warded off the blow by holding his club in both hands and hitting the assailant's chest. The time, place, and blow on the chest are consistent with the man being Yumich, but Nolan did not identify him, nor see the blow on his head. Nolan was unable to identify the officer at whom the swing was aimed.

The only other police officers who testified were Eraci, Rothgery, Gilbride, and Cotter. Eraci had seen Yumich in 1506A and thought he was intoxicated, but did not

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see anyone hit him. Rothgery, Gilbride, and Cotter did not recall seeing Yumich. The two National Guard officers who had been present and testified did not describe an incident similar to that described by either Yumich or Nolan.

Steven Shear, aged 17 at the time of trial, testified that he had gone to sleep at 1:30 or 2 a.m. on the floor of Room 1502. This was a room near the southeast corner of the elevator lobby. It had been used as a meeting room during the week. He had a pillow and had removed his jacket and shoes. On previous nights he had been assigned to a hospitality suite on the second floor as a sort of night watchman and had slept there. One of his co-workers told him he could sleep in 1502 the night in question. He testified he had nothing to drink. About 5 a.m. he was awakened by being pulled to his feet by three police officers who said he had no right to be in the room. He was pushed and pulled into the elevator lobby without his shoes on. He said he was standing in the east end of the elevator lobby when he was struck from behind with a sharp object, across his back near his neck, and knocked to the floor. Three policemen were near him. Whoever hit him was standing behind him. The doctor who gave first aid testified that he observed a "welt over the shoulder and back of the neck." The emergency room record shows the finding: "contusion over back of neck C-6 & just below point of R scapular."

No other witness described the Shear incident. The police officers testified that they did not recall seeing Shear and that they did not enter nor see other officers enter any rooms other than 1506A. Captain Cotter, in command, testified that he did not direct entry of other rooms. One campaign worker, Richard Warren, testified that he was sleeping on the floor in Room 1511 (also near the southeast

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corner of the elevator lobby) and was evicted by police officers.

In order to reach the verdict against Yumich, the jury would have had to find circumstances justifying the forceful eviction of those in his position. It could scarcely have found that he did not receive an injury from a blow on his head. Thus it would have to have found that that degree of force was not unnecessary. To do so, it would have had to disbelieve the witnesses who testified that Yumich offered no resistance, to find from Nolan's testimony that it was Yumich who swung his fist at an officer, and to infer that the threat reasonably made it necessary to strike him in the chest and on the head.[3]

It is more difficult to hypothesize a proper course of reasoning leading to the verdict against Shear. Justification of his eviction must rest either on a determination that under the arrangement made with the hotel for convention space, unregistered campaign workers had no right to occupy a meeting room like 1502 as a sleeping room, or disbelief that he was there and evicted by the police. There is no testimony of any resistance by him. He was unable to say what or who had hit him, and a verdict would have to rest on his failure as plaintiff to persuade the jury that the blow came from a police club rather than from some other source for which the police could not be held responsible.

Plaintiffs have not argued that the verdict is unsupported. We are not prepared to say that the verdict will so clearly result in a miscarriage of justice that this is

3. Counsel for the city conceded, in argument to the jury, that somebody behind Yumich "tapped him." He argued, however, "Well, I don't like to quote Al Capone as an authority but maybe—maybe he could teach philosophy at Berkeley, but Al Capone used to say after somebody was found dead, 'They don't kill you for nuttin.' And you don't get rapped on the head for nothing."

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one of the exceptional cases in which a federal appellate court can properly reverse and order a new trial on that ground.[4] In assessing plaintiffs' claims of reversible error, however, we are mindful of the obvious danger of prejudice against these plaintiffs inherent in the background circumstances, the paucity of direct evidence to refute their claims, the danger of an inflammatory, guilt-by-association, effect from the evidence concerning the objects dropped from 1506A, as well as the lack of testimony from the police officers who seem most likely to have been in a position to observe relevant facts. It seems virtually incredible, in view of the fact that the events took place in an area the size of an elevator lobby and of the substantial number of police officers present, that the two or more officers who participated in the Yumich incident were unable to remember it and that no other officer except Nolan observed and recalled it.

Plaintiffs contend that the court erred in refusing to give an instruction permitting an inference, under certain circumstances, that the testimony of a witness available to and under the control of a party, but not called by him, would have given testimony adverse to that party. Plaintiffs point out that only five out of fifteen to twenty police officers present in the elevator lobby were called by the defendants.

The trial judge at first indicated his view that plaintiffs were entitled to the instruction. When told by the city's counsel that all the officers had been present at trial and available, the trial court decided that the officers were equally available to plaintiffs and refused the instruction. In this we think the court erred.

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4. See *Aetna Casualty & Surety Co.* v. *Yeatts* (4th Cir., 1941), 122 F. 2d 350, 354 *Charles* v. *Norfolk & Western Ry. Co.* (7th Cir., 1951), 188 F. 2d 691, 695; *Shupe* v. *New York Central System* (7th Cir., 1965), 399 F. 2d 998, 1002.

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It has been held that where there is likelihood of bias on the part of the person not called as a witness in favor of one party, "that person is not, in a true sense, 'equally available' to both parties; and, except in unusual circumstances, a party's employees come within that category."[5] Here the police officers were not only the employees of the city, but had a strong personal interest in the success of the city's defense of their conduct on the occasion in question.

The city points out that it had given plaintiffs the statements of the officers and that plaintiffs had taken their depositions. The city has cited Illinois cases where it was decided that a missing witness instruction was properly refused and where the court noted that the party requesting the instruction might properly have called the person as an adverse witness without being bound by his testimony.[6] We do not consider ourselves bound by the state rule on that subject in a diversity case.

Plaintiffs' counsel, however, had the opportunity to comment in oral argument to the jury upon the absence of testimony from police officers, refuting plaintiffs' version. Counsel repeatedly pointed this out and argued that if Yumich had really given cause to be struck on the head, such testimony would have come out. The majority of the court are of the opinion that since plaintiffs were permitted to comment in his fashion, it was not reversible error to refuse the missing witness instruction. The author of this opinion, however, individually holds the view that in the circumstances of this case it was an abuse of discretion to withhold the support which the instruction would have given to this line of argument.

5. *United States* v. *Beckman* (2d Cir., 1946), 155 F. 2d 580 584.

6. *In re McVicker's Estate* (1963), 39 Ill. App. 2d 389, 188 N. E. 2d 731, and *Pawlowic* v. *Pearce* (1965), 59 Ill. App. 2d 153, 207 N. E. 2d 155.

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Plaintiffs further contend that the testimony of a number of witnesses about the objects dropped from the windows of 1506A was irrelevant. They argue that this evidence was "highly prejudicial since it clearly would tend to create in the minds of the jurors the impression that Plaintiffs were in some way connected with these allegedly illegal and dangerous acts, or at the very least were associated with some very undesirable people who were doing these acts." That there was palpable danger of improper reaction by jurors to these circumstances is evident.

At trial, plaintiffs sought an order requiring defendants not to offer evidence that objects were thrown from windows. Plaintiffs correctly asserted that no evidence connected them with the throwing of such objects, and they stated that "Plaintiffs do not contend that the entry into, or clearing of, Room 1506A was unlawful."

We cannot say that evidence along these lines was wholly irrelevant. The alleged assaults occurred in the course of the eviction of plaintiffs and other people from the 15th floor, and plaintiffs' concession did not go quite so far as to say that plaintiffs were not challenging the propriety of that eviction. Nevertheless the real, central issue at trial was whether the force used on Yumich and allegedly on Shear was excessive, and not whether the eviction was proper. Although defendants were probably entitled to show the background facts to some reasonable extent, we think that the great tendency toward prejudice inherent in this evidence imposed a duty on the trial court to keep it within much closer bounds.

Defendants followed the strategy of laying great emphasis upon the areas of evidence in which they could make the most favorable showing, but which were least relevant to the real issue and most likely to have an

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inflammatory effect, *i.e.*, the foolish, dangerous activity in which some of the people on the 15th floor had indulged, and which produced the entry of the police, and the activity of John Warren, no longer a plaintiff, which apparently justified the blow on his head. It appears that the officers who were not involved in or close to the John Warren incident would have been more likely to have observed the incidents invoking Yumich and Shear.

The first six witnesses for the defense were National Guard officers. Three of them were never on the 15th floor and testified only concerning the dropping of objects into the street. Lt. Conroy testified that he had observed a ¾ inch ball bearing which dented the hood of a jeep, a can of beer which exploded when it hit the sidewak, and a glass object. He described how a sniper team located the window from which things were thrown. Col. Strupp testified about objects thrown from the window. "There were beer cans, there were ball bearings, there were broken ashtrays, there were broken glasses; there were beer cans full of human waste, there were some beer cans which I believe had urine in them. There were some items there that really could have killed somebody if they hit somebody." He also described how the window was located. Major Brown testified that he saw glass and beer cans strike the ground near the troops and that the troops were ordered back against the building. He also described the process of location.

Col. Tress did get to the 15th floor and testified concerning matters there. He also testified concerning broken ashtrays, a steel ball bearing, beer cans partially filled with liquid, falling to the street, and the process of locating the window. Dr. Glatter, battalion surgeon, testified in part about matters on the 15th floor, and also described similar objects which had fallen and the process of location.

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The sixth guardsman witness was Mr. Ochsenschlager. When he was called the court suggested that his testimony would be cumulative, and he was examined only as to his observations on the 15th floor. John Warren was later called by defendants and admitted he had seen one or more beer cans dropped out the window. A hotel bellman, Costanzo, testified, among other things, that he had looked into 1506A and seen 3 or 4 people throwing beer cans and ash trays out the window, handed them by others.

Considering all the circumstances, and granting that a very limited amount of testimony concerning the facts which brought the police to the 15th floor may have been appropriate, we think that the emphasis on the revolting conduct of the people who dropped objects out of the window deprived plaintiffs of a fair trial of the real issue in the case, whether the force used on Yumich and Shear was excessive.

The judgment is reversed and cause remanded for a new trial.

No. 18397

PELL, *Circuit Judge*, dissenting.

I must respectfully dissent. I would affirm the judgment below.

The majority opinion of the court seems to be predicated on the feeling that the trial did not come off quite fairly to the plaintiffs. Yet it is conceded on the elements involved that (a) the verdict was supported and was not so clearly a miscarriage of justice as to make that ground per se cause for reversal; (b) the refusal to give the tendered instruction on missing witnesses was not reversible error and (c) the defendants were properly entitled to show as back-

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ground facts the lawless activity being conducted for a substantial period of time in the immediate locale of the plaintiffs.

In final analysis, it seems we are sending this case back for a new trial because the trial judge is found to have failed to impose quite soon enough a curb on the extent of evidence admittedly admissible to some extent. This seems to be a matter of judicial discretionary judgment and on the record before us I do not think we should fault the judge on the basis that the particular evidence should have been cut off at an earlier point which in our retrospective judgment we now think was the desirable terminal point.

Since the evidence was admissible initially, if only one witness had testified to the orgy of spewing of items from the fifteenth floor of the hotel, the jury would have been aware of what had transpired and the defendants would have been entitled to a full exposition of these background facts on final argument.

I concede that evidence, as well as instructions, may be prejudicially repetitive but I think that a reversal should only result from the admission of corroborative evidence when the trial judge's discretion has been more clearly abused than it has been here.

The corroboration has an additional significant aspect here. The trier of fact should not be required to consider police action in a vacuum but rather in the context in which it was exercised, here that of senseless lawlessness. It seems to me that the additional testimony served to establish that it could have been no secret to the plaintiffs that they were present, if not themselves participants, at activities designed to precipitate law enforcement appropriate to the disturbance. The measure of that disturbance and its obviousness to the plaintiffs is found in the testimony which the district court permitted in evidence.

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The only countervailing argument presently occurring to me on the basis of the extent of the activity is that it might have been thought by the plaintiffs that it was of such magnitude and that since nothing had been done about it by 5 o'clock in the morning, possibly the police had abandoned any effort to curb lawless activity.

With regard to the matter of the missing witnesses instruction I find a very astute analysis of this matter in McCormick, *Law of Evidence* § 249, p. 533 et seq.

In my opinion the conclusion of Professor McCormick (at p. 536) is correct that even though the failure to call an available witness may be argued, it should not be the basis of an instruction as a matter of right. Here the city had furnished copies of the statements of the police officers taken by the Corporation Counsel and the plaintiffs had taken the deposition of each of the policemen and examined them in detail. In my opinion, the instruction was properly refused.

For the reasons hereinbefore set out, I would affirm the judgment.